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STATE [illegible]

Petitioner,

vs.

THE STATE [illegible] BOARD OF [illegible] OF THE [illegible], a [illegible], [illegible] Board of the [illegible] of [illegible] and [illegible], [illegible] HUGO [illegible], Governor of the State of Montana, President of said Board, JAMES M. [illegible], Secretary, Member of said Board, [illegible] Auditor of the State of Montana, SAM W. [illegible], Secretary of State of the State of Montana, ARNOLD H. OLSEN, Attorney General of the State of Montana, and LOU W. BRUTGER, Commissioner of State Lands and Investments,

Respondents.

Brief In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Montana

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INDEX

i

CASES

	Page
California v. San Pablo and Tulare R.R. Co., 149 U.S. 308	4, 5
State ex rel. Rausch v. Amerada Petroleum Co., 78 N.D. 247, 49 N.W. (2d) 14, (1951)	7
State ex rel. Westlake v. District Court, 119 Mont. 222, 167 Pac. (2d) 588	3
State Bank of New Salem v. Schultz, 63 Mont. 410, 209 Pac. 599	3

STATUTES

Public Law 480, 80th Congress, 62 Stat. 170	6
Chapter 18, Laws of 1949 (Montana)	7
Chapter 122, Laws of 1953 (Montana)	9, 10

MISCELLANEOUS

Article XI, Section 4, Constitution of Montana	9
Complaint of Willis B. Jones, Para. X and XII	2

Supreme Court of the United States

OCTOBER TERM, 1954

No._____

STATE OF MONTANA, ex rel. FORD JOHNSON,

Petitioner,

vs.

THE STATE BOARD OF LAND COMMISSIONERS OF THE STATE OF MONTANA, as Governing Board of the Department of State Lands and Investments; J. HUGO ARONSON, Governor of the State of Montana, President of said Board; MARY M. CONDON, Superintendent of Public Instruction of the State of Montana; SAM W. MITCHELL, Secretary of State of the State of Montana; ARNOLD H. OLSEN, Attorney General of the State of Montana, as members of said Board, and LOU W. BRETZKE, Commissioner of State Lands and Investments,

Respondents.

Brief In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Montana

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1. THE QUESTION IS MOOT

The Court is being asked, in this action, to render an advisory opinion upon an issue which is no longer in controversy.

This case began with an application for an injunction by a Montana taxpayer named Willis B. Jones to enjoin the leasing of seventy-six (76) named and described tracts

of school land in Montana. He alleged, as the basis for his injunction, that less money would be gained from the competitive bidding on these leases if the leases were let upon the terms then contemplated by the State Land Board. The application for the injunction recited in Paragraph X:

> "That on the 29th day of April, 1953, at 10:00 o'clock A. M., at the State Capitol in Helena, Montana, and pursuant to the direction of the defendant State Land Board, *certain school lands, a list of which is hereto attached and by this reference made a part hereof,* will be presented for competitive bidding for oil and gas leasing; that said leases will be made on the form of lease used prior to the aforesaid legislative action of the 1953 session of the Montana Legislature; and that such letting will be conducted by the defendant Lou W. Bretzke as Commissioner of State Lands and Investments." (Emphasis supplied).

Again in Paragraph XII the relator, Mr. Jones, said:

> "That the failure and refusal of the defendant Land Board to offer a lease for oil and gas on state lands in the form and terms of the said Chapter 122, which terms are more advantageous to and desired by the oil industry, will result in a reduction in the amount of money that will be bid as first year rental for *said leases* by the representatives of such industry; and will reduce the amount of money that will be available for distribution to the school districts as a distributive share of the said Interest and Income fund for the fiscal year 1953-54." (Emphasis supplied).

For his remedy, the relator requested the Court that after hearing "a peremptory writ issue, such as shall be meet

and equitable, commanding said defendants to do and perform such acts and things as may be necessary and proper in the premises." The list of tracts of land was made part of the Complaint in the action by the reference in Chapter 10; through inadvertence this list was not included in the transcript of the case presented to the Montana Supreme Court. There can be no doubt that the injunction, although worded in general terms, applied only to the subject matter put in issue by the relator Jones; that is, the seventy-six (76) tracts of land which had been scheduled for sale on the 29th day of April, 1953. Ford Johnson, the petitioner here, was an intervenor in the action below. As such, he was required to take the action as he found it, and his rights were as broad, but no broader, than those of the original applicant. (State ex rel. Westlake v. District Court, 119 Mont. 222, 167 Pac. (2d) 588, State Bank of New Salem v. Schultz, 63 Mont. 410, 209 Pac. 599). He could not demand relief to which the original applicant would not be entitled on the showing made in the application.

During the pendency of this action and prior to the final decision upon the point by the Montana Supreme Court, all of the persons who had applied for the leases which were to have been let at the sale on April 29, 1953, asked that their applications be withdrawn. A policy of the Land Board in effect for many years requires that each application be accompanied by a deposit of money sufficient to cover the statutory minimum first-year rental if no higher bids for the lease are received. All of the applicants for

leases in this action had, before the decision of the Montana Supreme Court was handed down and long before this petition for certiorari, asked for and received the return of their deposits. Upon this return, their applications were completely and finally withdrawn.

No leases on oil and gas lands are ever let by the State Board of Land Commissioners without application. At the present time there are no applications for leases upon any of the tracts which were in issue in the Jones case. A sale of state leases was announced and held after the decision of the Montana Supreme Court in this case and before this petition for certiorari. There were no applications for any of these tracts of land and none of them were leased.

It is a familiar rule of this Court that moot questions are not decided and that advisory opinions are not given in cases where no actual legal controversy exists.

The rule laid down by this Court for its own guidance in the case of California v. San Pablo and Tulare Railroad Company, 149 U.S. 308, is directly in point here:

> "* * * The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or or property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propo-

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sitions, or to declare, for the governing of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

If a mere opinion upon a point of law was all that was desired by the petitioner in this action, a declaratory judgment could have been requested from the courts of the State of Montana. This was quite obviously not the case. The original petitioner desired to prevent a sale which he believed would be made upon unlawful terms—that sale was never held. None of the leases to be offered at that sale were ever offered. By consent of both parties to the contemplated leases, the applicants and the State of Montana, these applications have been cancelled.

It is, we think, significant that no steps were taken by the petitioner for certiorari in this case to keep the injunction issued by the State District Court in effect during the pendency of this petition. The reason is obvious—there was at the date of this petition nothing to which an injunction could any longer attach.

We submit that this action has been terminated and that any decision made by this Court could have no force and effect in this action. It could not reinstate an injunction which was allowed to lapse and which could not in any

event attach to anything. It can have no effect upon a lease sale which was long ago cancelled by consent of all concerned.

II. THE LAW INVOLVED IN THIS ACTION IS A STATE AND NOT A FEDERAL STATUTE

The status of the Montana Enabling Act has been construed by the Montana Supreme Court and by this Court on several occasions in the past. Its legal effect is well known: it is a compact between two sovereign governments which may be changed only by mutual consent of the parties. A mere action of Congress changing the terms of the Enabling Act is a nullity unless accepted by the State of Montana. Similarly, any attempted change by the State of Montana would be of no effect unless authorized by the Congress of the United States. The most recent change in the Enabling Act (Public Law 480, 80th Congress, 62 Stat. 170) was a nullity and of no force and effect in the State of Montana until accepted by the State of Montana. *It is the Montana legislation and not the Federal Act which must be looked to in determining what the Enabling Act means in the State of Montana.*

A proposed change in the Enabling Act by Congress extends an option to any state or states touched by the Enabling Act to change those restrictions within their boundaries. The suggested change need not be accepted at all; it could be partially accepted and only a certain

portion of the proposed change made effective in the particular state. We submit that the Act which accepted the offer extended by Public Law 480 of the 80th Congress is the operative law in this case. (There has even been some doubt raised by one member of our Supreme Court whether the method used in adopting this change was Constitutional under the Constitution of Montana). The Montana Act, Chapter 18, Laws of 1949, merely recited that the change was accepted and recited the full text of the Congressional legislation. We submit that by this procedure the statute became the law of Montana subject to the construction and the rules of construction obtaining in the State of Montana; and it is this Act and not the preceding Federal Act, which admittedly did not effect Montana upon its passage, that must be construed in this case.

III. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE MONTANA SUPREME COURT AND ANY DECISION IN ANOTHER STATE BOUND BY THE SAME ENABLING ACT

It is contended at page 17 of the Petition filed in this case, that the Supreme Court of the State of North Dakota came to a conclusion diametrically opposed to that of the Montana court in the case of State ex rel. Rausch v. Amerada Petroleum Corp., 78 N.D. 247, 49 N.W. (2d) 14 (1951). At page 18, the petitioner quotes the portions of the Rausch decision upon which he relies to sustain his contention. There is no mention in either of these quotations of a contest over the term of the leases and, indeed,

there could not be any. No such argument was made in the Rausch case, and the Court neither decided it nor was asked to decide it.

The Rausch case concerned two arguments familiar in the land-grant states; whether, under the usual terms of enabling acts, the state received the minerals in the granted lands and whether the states were permitted to lease the lands or the minerals. These were points of great difficulty and gave rise to much litigation in the western states in years gone by. The point was so troublesome, in fact, that most, if not all, of the enabling acts have been changed to spell out, specifically, the right of the states to ownership of the minerals in granted lands and the rights of the states to lease their lands.

All that the Rausch case said, and all that it can be construed as saying, was that Congress had settled these questions by changing the Enabling Act. There was no contention by any party in that case that any specific terms were allowed by the Enabling Act change. The decision could not possibly be in conflict with the holding of the Montana Supreme Court and the most cursory reading of the Rausch case will show it.

The Rausch case was discussed by all the attorneys in this action when the case was pending in the Montana courts. It was generally conceded to have no application. The purpose in raising it here is evidently to try to show

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something akin to the familiar "conflicts in the circuits" rule which is often used to justify certiorari from this Court to the lower courts in the Federal system. The argument is extremely tenuous—one glance at the Rausch case will destroy it.

We submit that the conflict of decisions referred to in the petition is non-existent.

IV. POSITION OF THE LAND BOARD

It is the understanding of the majority of the State Land Board of Land Commissioners that a separate brief is being filed in this proceeding by Governor J. Hugo Aronson. Governor Aronson in this instance is acting in a purely individual capacity, and does not represent the State Board of Land Commissioners, or the State of Montana. Article XI, Section 4 of the Constitution of Montana places in the State Board of Land Commissioners the "direction, control, leasing, and sale of the school lands of the state." The members of the Board are the Governor, Secretary of State, Attorney General, and Superintendent of Public Instruction.

It was the judgment of three of the four members of this Board that they could not comply with the mandate of Chapter 122 of the Laws of 1953 without violating their constitutional duties as custodians of the school lands. The Governor opposed their determination. Throughout this action, the Governor has opposed the majority of the Board

and has, in spite of his position as a Board member and a defendant, joined the petitioner and opposed the majority decision.

We wish it to be clear to this Court that the Governor, in this instance, speaks neither for the Board nor for the State, and his desires are not those of the State Board of Land Commissioners. If, as expected, the Governor again joins the opposition at this stage of the proceeding, the majority of the State Board of Land Commissioners declines to be bound by his act. If the Governor concurs with the petitioner in requesting this Court to take jurisdiction, it does not, in any way, alter the opposition of the State Board of Land Commissioners to the exercise of this Court's jurisdiction.

The state law which is involved in this proceeding, Chapter 122, Laws of 1953, has had a long and stormy history in Montana. Some aspect of it has been considered at every legislative session for approximately forty years. Most legislative sessions have refused to entertain it. Twice before, when passed by both houses of the legislature, it was vetoed by a Governor. In 1953, forty years of pressure from the oil industry had so eroded our state system of constitutional safeguards that an indefinite lease of state lands was finally enacted into law.

The State of Montana has given better protection to its granted lands than any other state in the Union. The vigilance of successive Boards of Land Commissioners has preserved almost intact the heritage of our public schools.

The 1953 Act was the first serious interference by a legislature with the management of the land grant. It was the first interference committed at the request of an industry anxious, at the expense of the schools, to profit. The majority of the State Board of Land Commissioners feel that the 1953 Act is a land grab, purely and simply. It poses a question that can be answered only at the state level. This Court is being asked to interfere in a vital issue of state government; to use its power to interfere in an action which is already moot, at the instance of a party who is only a nominal plaintiff and who did not even enter the action until well after it had been begun by someone else. The Court is being requested to step in and rescue, at the last extremity, a land grab that failed.

There is a certain irony in the fact that the power of the United States, which set up the original grant with strict instructions for its preservation, is now being invoked in an attempt to tell the State of Montana that it has guarded its land grant too well, and that it must now relax its safeguards so the school lands can be made a source of private profit.

It is respectfully submitted that the Court should refuse the petition for certiorari.

ARNOLD H. OLSEN,
Attorney General of the State of Montana,
Helena, Montana

WILLIAM F. CROWLEY,
Assistant Attorney General,
Attorneys for Respondents.

AFFIDAVIT

STATE OF MONTANA)
ss:
COUNTY OF LEWIS & CLARK)

ARNOLD H. OLSEN, being first duly sworn, on oath, deposes and says:

That he is the Attorney General of the State of Montana.

That after the Brief to which this is attached had been printed, it was discovered that certain statements of fact contained therein were incorrect.

That the arguments and conclusions of the Brief are not affected by the inaccuracies, that your affiant desires that the facts presented to the Court be entirely accurate.

That it is stated in the printed Brief at page 4 that all of the applications for leases which were to be offered at public auction on April 29, 1953, were withdrawn during the pendency of this action. Investigation has shown this to be incorrect, as is more fully stated in the Affidavit of Iva Janet Smith which is attached hereto.

That the correct facts are these: Seventy-one of the seventy-six applications were withdrawn as stated. Five applications were not withdrawn and the tracts of land thus applied for were offered for lease and sold at public auction on January 18, 1955.

That your affiant believes that the facts herein stated do not change, but rather add weight to the conclusions stated in the Brief that this case has been completely disposed of and that the questions presented

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for decision to this Court are moot.

ARNOLD H. OLSEN
Attorney General of Montana

Subscribed and sworn to before me this 24th day of February, 1955.

Notary Public for the State of Montana; Residing in Helena, Montana; My Commission Expires January 19, 1958.

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AFFIDAVIT

STATE OF MONTANA)
: ss.
COUNTY OF LEWIS AND CLARK)

EVA JANET SMITH, being first duly sworn, on oath, deposes and says:

That she is the mineral leasing clerk of the State Land Department of the State of Montana.

That she receives all applications for leases, lists them, and notifies the Commissioner of State Lands and Investments and the State Board of Land Commissioners that applications have been received. When the State Board of Land Commissioners sets a date for sale of leases on state lands, she arranges for public advertising and lists the leases which will be offered. After public competitive bidding for the leases and acceptance or rejection of the highest bid for each tract by the State Board of Land Commissioners, she prepares lease forms for issuance to the successful bidders. She then enters the leases in the official records.

It is also her duty, when applications for leases are withdrawn, to remove the tract of land from the list of lands to be advertised and offered for lease; when applications are withdrawn, it is also one of her duties to refund the deposit of money which must accompany each application for lease.

That leases had been applied for on 76 tracts of state land prior to April 29, 1953, and that these 76 tracts were scheduled to be offered for lease by competitive public bidding on that date.

That the scheduled public sale of leases on these 76 tracts on April 29, 1953, was enjoined by order of

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HELENA, MONT.

the District Court of Lewis and Clark County, State of Montana, and said sale was never held then or thereafter.

That the applications which had been received for leases upon 71 of these 76 tracts were withdrawn individually and at various times by the applicants during a period of approximately 16½ months after the institution of the action for the injunction.

That in the regular course of business, your affiant returned the deposits of money and cancelled the applications where requested. That she took the usual steps to indicate on the records of the State Land Department that there was no application for lease of the tract concerned.

That the first withdrawal of an application for one of the 71 leases scheduled to be sold on April 29, 1953, was on May 16, 1953, and the last on October 1, 1954.

That no new application for a lease on any of these 71 tracts has been received in the State Land Office since the withdrawal of the applications which were on file on April 29, 1953.

That five of the 76 applications were not withdrawn. On January 18, 1955, these 5 tracts of land were put up for public bidding and leases upon them were sold to the highest bidder, as described below.

That on January 18, 1955, after the decision of the Montana Supreme Court in the case of Willis B. Jones vs. State Board of Land Commissioners, and before the institution of the petition to this court for a writ of certiorari by Ford Johnson, there was a public sale of leases upon state lands, at which sale all leases for which applications were then on file were put up for public competitive bidding.

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That none of the 71 tracts upon which applications for leases were withdrawn on or before October 1, 1954, were applied for, offered or leased at the sale on January 18, 1955.

Eva Janet Smith

Subscribed and sworn to before me this 25th day of February, 1955.

Chas. E. Leaphart

Notary Public for the State of Mont.
Residing at Helena, Montana
My Commission Expires January 19, 1956

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